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In the Supreme Court of the United States

OCTOBER TERM, 195[redacted]

No. [redacted] 81

HENRY J. HARRIS,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BY COURTS BELOW.

Petitioner, Henry J. Harris, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Ohio to review the judgment and decision of that court in Case No. 35,600, entitled *Henry J. Harris v. The Pennsylvania Railroad Company*, which court in a judgment (App. F) and opinion dated March 11, 1959, reversed the judgment of the Court of Appeals of Cuyahoga County, Ohio, Eighth Judicial District of Ohio. The opinion of the Supreme Court is reported in 168 Oh. St. 582, 156 N. E. 2d 822 (1959), and is appended herein as App. A. In the opinion of the Court of Appeals of Cuyahoga County, Ohio, (App. B), which opinion is reported in 77 Oh. L. Abs. 147, 146 N. E. 2d 744 (1957), that court affirmed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, which Court had overruled motions for a new trial, for judgment notwithstanding the verdict, and entered judgment on the verdict of the jury for petitioner in the sum

of Twenty-Five Thousand Dollars ($25,000.00). The journal entry of the trial court of judgment for petitioner is appended to this petition (App. C). The journal entry of the Court of Appeals of Cuyahoga County, Ohio affirming judgment for petitioner is appended to this petition (App. D).

JURISDICTION OF THIS COURT.

The entry of the judgment of the Supreme Court of Ohio of which review is sought was dated March 11, 1959. Jurisdiction of this Court to review the said judgment of the Ohio Supreme Court by writ of certiorari is conferred upon this Court by the Act of June 25, 1947, c. 646, 62 Stat. 929, Title 28, U. S. C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act was the state court correct in holding that the jury's finding of specific negligence in the following respect: "In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing," was the equivalent of a finding by the jury against petitioner in each and every other respect of negligence claimed, where there was credible evidence in the record to

support each and every allegation of negligence in the petition, and a general verdict was rendered by the jury in favor of petitioner?

2. In an action under the Federal Employers' Liability Act where the jury in response to an interrogatory prepared and submitted by the respondent railroad finds that said respondent was negligent in the following respect: "In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing," may the reviewing State Court thereupon set aside a general verdict for petitioner for insufficiency of evidence where there is credible evidence in the record to support the finding of the jury?

3. In an action under the Federal Employers' Liability Act where the jury found that respondent was negligent "in that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing"; and where the evidence was undisputed but that the crosstie referred to by the jury in answer to said interrogatory was protruding four to five inches above the ground level, may a state court of review, governed by the principles of judicial review set forth by this Court, hold as a matter of law that such protrusion of the crosstie cannot be a basis for negligence under the Federal Employers' Liability Act?

4. In this action under the Federal Employers' Liability Act was the jury's specific finding of negligence, "In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing," consistent with the general verdict for petitioner and supported by credible evidence when correctly tested

by principles governing judicial review set forth by this Court?

5. In an action under the Federal Employers' Liability Act, where the undisputed evidence discloses that petitioner was performing wreck train service for his employer in the course and scope of his employment on premises of a foreign railroad under conditions of inclement weather, may a state reviewing court, guided by the principles of judicial review of this Court, reverse a judgment for petitioner and enter final judgment for respondent on the ground that petitioner encountered an ordinary risk in the course of his accustomed employment?

STATUTES INVOLVED.

The federal statutes involved in this review are those of the Federal Employers' Liability Act, particularly Section 1 thereof (Title 45, U. S. C., Section 51).

Jurisdiction of the federal claim by the state court is provided in Section 6 of the Federal Employers' Liability Act (Title 45, U. S. C., Section 56).

The following statutes of the State of Ohio will aid in an understanding of some of the issues in this appeal: Ohio Revised Code, Sections 2315.16 and 2315.17.

The foregoing federal and state statutes are appended to this petition (App. E.).

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition alleged (R. 1)* and the answer to the petition admitted (R.

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* All references to the record are numbered in accordance with the original numbering of the printed record of the Supreme Court of Ohio.

4) that petitioner was in the employ of respondent as a car repairman helper and as a car repairman, engaged in the maintenance and repair of freight cars, and that on or about the 28th day of March, 1953 both plaintiff and defendant were engaged in interstate commerce; that plaintiff's action is based on and governed by the provisions of the Federal Employers' Liability Act (Title 45, U. S. C.). The action, therefore, arose and was tried under the provisions of the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following). The trial resulted in a general verdict for petitioner against respondent in the sum of Twenty-Five Thousand Dollars, and judgment was entered accordingly in the Court of Common Pleas (R. 8) on November 14, 1956. On December 28, 1956 (R. 9) respondent's motions for an order of the trial court to vacate and set aside the verdict of the jury, for an order for judgment notwithstanding the verdict of the jury, and for a new trial were overruled.

At the trial the grounds for recovery asserted by petitioner consisted in substance of requiring him to remove unassisted an out-rigger block which was embedded in mud alongside a crosstie which was protruding four or five inches above ground level. After being refused requested assistance by his foreman, petitioner was required to assume an off balance position with his right foot on the crosstie and his left foot on the ground straddling the outrigger block (R. 29). While he tugged, it suddenly came loose which caused his right foot to slip on the crosstie which contained grease. This occurrence resulted in a herniation of a lumbar intervertebral disc of petitioner which necessitated removal by surgery (R. 32). The medical testimony of the operating orthopedic surgeon, Dr. Wallace Duncan of Cleveland, Ohio, was undisputed and not included in the printed record certified to the Supreme Court of Ohio as no error was claimed thereon.

The evidence was undisputed that from the time petitioner was called to duty, which was approximately 7:15 P. M., and throughout the night up until the time of his injury, which was at approximately 11:30 P. M. of March 28, 1953, there was constant rain and sleet. Petitioner and his fellow workers were members of a wreck train crew who were sent by their employer, the respondent herein, to the premises of the Nickel Plate Railroad (R. 138). Two derailed cars were to be righted by a device known as a derrick car which was stabilized by out-riggers supported by blocks. The specific job of petitioner was to carry blocks from a block car to the out-riggers of the derrick car and block the out-riggers so the derrick would not tip over. When the derrick car was moved to a new location, petitioner's job further required him to remove the out-rigger blocks and re-block the derrick car at its new location. The heaviest blocks were placed on the bottom and lighter blocks placed on top in the process of blocking the out-riggers. The blocks themselves were placed on the ground by the crossties of the track. It was in the process of removing an out-rigger block that petitioner sustained his injuries.

It was the testimony of petitioner that the particular outrigger block which he was in the process of removing when sustaining his injuries was stuck in the mud so close to a crosstie that he could not get in position to pull it out of the mud. Petitioner testified that he asked his foreman for help and was told, "We are busy. Hurry up." Petitioner commenced to tug and pull at the out-rigger block which thereupon jumped out of the mud causing him to wrench his back (R. 28).

With regard to the existence of the grease on the crosstie, which was found to exist by the jury in its specific finding of fact, petitioner testified (R. 55) that there

was grease under the mud on the crosstie which he discovered on his right shoe which was the shoe that had been placed upon the crosstie:

"Q. There was grease on the block?

A. Grease under the mud because it was on the right side of my feet under the shoe.

Q. How much grease was there?

A. I don't know how much grease there was. There was enough for me to tell you."

The record further discloses that throughout the evening petitioner was the only person who slipped while performing the work duties of the wreck crew and he only on this one occasion. The jury could thus logically infer that the grease which petitioner observed only on his right shoe must have been obtained while in the performance of the particular task which gave rise to his injury (R. 85).

There was further testimony about grease on ties from respondent's witness Charles Tricska (R. 148-149) who was described as a section foreman directed to inspect the area where the accident had occurred and who was specifically questioned as follows:

"Q. Was your attention directed to grease or anything *on the ties*? (Emphasis added)

A: Well, there is some grease where we keep the switches lubricated, you cannot get away from that. You see them switches are lubricated at least twice a week, otherwise they wouldn't be able to throw them."

From this testimony the jury could logically infer that since Tricska was asked specifically about grease on ties he was referring to grease on ties when he referred to grease where switches were lubricated.

The case was submitted to the jury on the issues of respondent's negligence in the four respects set forth in

petitioner's petition and causation. The jury found generally in favor of petitioner awarding damages in the sum of Twenty-Five Thousand Dollars. ($25,000.00). At the request of respondent's counsel, interrogatories were submitted to the jury requiring findings upon particular questions of fact. These interrogatories were prepared by respondent's counsel under the pertinent Ohio statute (Ohio Revised Code, Section 2315.16), which imposed upon the trial court the mandatory duty to instruct the jury to find upon particular questions of fact submitted. The interrogatories submitted by respondent and the jury's answer thereto are as follows:

"I. Was the defendant negligent?

Answer: Yes.

II. If your answer to Number I is 'Yes,' state of what that negligence consisted.

Answer. In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil; thereby affording unstable footing."

The trial court thereupon entered judgment for the petitioner upon the general verdict in his favor by the jury and overruled seasonable motions for judgment notwithstanding the verdict and for a new trial. The judgment of the trial court was affirmed in a split decision by the Court of Appeals (App. B), whereupon respondent perfected an appeal to the Supreme Court of Ohio, which reversed the judgment of the Court of Appeals in favor of petitioner and entered final judgment for respondent. The opinion of the Ohio Supreme Court sets forth as the reasons for this decision as being that there was insufficient evidence to support the finding of the jury of grease on the tie; that the elevated crosstie upon which petitioner

was required to position his right foot did not constitute negligence as a matter of law, and that plaintiff assumed the ordinary risks of his employment.

The Supreme Court of Ohio further stated in its opinion that the findings of the jury as to the negligence of the respondent were conclusive and the equivalent of an express finding by the jury rejecting each of the other allegations of negligence against respondent submitted to it for consideration, thereby narrowing the general verdict in favor of petitioner to proof of the single respect found by the jury in its answer to the interrogatories.

ARGUMENT.

Summary.

The Supreme Court of Ohio has denied petitioner a judgment under the Federal Employers' Liability Act which both the trial court and the Court of Appeals of Cuyahoga County, Ohio, had granted him. This petition seeks to correct fundamental errors in the very nature and method of the judicial review indulged by the Supreme Court of Ohio in an action under the Federal Employers' Liability Act, particularly where interrogatories or special findings are involved under the appropriate Ohio Interrogatory Statutes.

The Ohio Supreme Court's decision was not based upon any error in the charge to the jury either before or after argument, nor in the amount of the verdict. In fact, respondent at no time, either in its appeal to the Court of Appeals, or to the Supreme Court of Ohio, has ever claimed that the trial court erred in its charge, in the admission or exclusion of evidence, nor that the verdict itself was excessive for the injuries proved by the evidence. The sole ground of error, in effect, prosecuted to the Supreme

Court of Ohio, was that the single finding of negligence by the jury in response to the interrogatories submitted to it is unsupported by the evidence and does not constitute negligence under the Federal Employers' Liability Act.

Question No. 1.

The Supreme Court of Ohio in its opinion in the instant case in determining what acts of negligence, if any, are chargeable to the instant respondent, limited the question to those acts specified by the jury in its answer to the interrogatories. The Court further held that other claimed acts of negligence on the part of respondent were found by the jury not to have been established. This holding by the Supreme Court of Ohio was by judicial construction of the interrogatory statutes and not by any finding of the jury itself. The basis for this holding is *Masters v. New York Central Railroad Company*, 147 Oh. St. 293, 70 N. E. 2d 898 (1947), certiorari denied, 331 U. S. 836, 91 L. Ed. 1848, 67 S. Ct. 1519 (1947), rehearing denied, 332 U. S. 786, 92 L. Ed. 369, 68 S. Ct. 33 (1946).

The *Masters* case was an action under the common tort law of Ohio and not under the Federal Employers' Liability Act. It involved an attempt by a prospective passenger to board a moving passenger train as a result of which he lost his grip on the handhold and was thrown down between the rails and dock sustaining severe injuries. The second paragraph of the syllabus of the Court reads as follows:

> "An interrogatory requiring the jury in a personal injury action, in the event the jury finds the defendant guilty of negligence, to specify the act or acts of negligence is a proper inquiry; *and the failure or inability of the jury to find the existence of a claimed act of negligence, in answer to interrogatories so sub-*

mitted, is equivalent to a finding on such claim of negligence against the party having the burden to establish it." (Emphasis added.)

A close analysis of the *Masters* case reveals that the petition claimed both simple negligence in six itemized respects and willful or wanton misconduct in four itemized respects. The Supreme Court of Ohio in its review of the record held that plaintiff was guilty of negligence proximately causing his own injury as a matter of law. The court further noted that in answer to a specific interrogatory as to the respects of *negligence* found, the jury found the defendant guilty of only the first two acts of negligence itemized in the petition, and did not include in its findings any of the itemized respects of claimed willful and wanton misconduct.

It might well have been held that inasmuch as the jury was not requested to state any respects in which the defendant was guilty of willful and wanton misconduct, that a general verdict for the plaintiff was consistent with the jury's findings in answer to the interrogatories submitted, inasmuch as contributory negligence would not be a defense to an action based on willful and wanton misconduct. Nevertheless the Supreme Court of Ohio took the narrow view that although the jury was requested only to specify the *negligence* of the defendant, that its failure to include in the answer to this interrogatory any of the respects of *willful and wanton misconduct* was the *equivalent* of a failure by the jury to find from the evidence any of the specifications of willful and wanton misconduct itemized in the petition. This doctrine of strict construction against the pleader under the Ohio interrogatory statute was thus instituted into the common law of Ohio despite the Supreme Court of Ohio's own definition of willful or

wanton misconduct as being a tort entirely distinct and of a different character than negligence, *Tighe v. Diamond*, 149 Oh. St. 520, 88 N. E. 2d (1948).

It is respectfully contended that the application of this narrow view of the Ohio Interrogatory Statutes (Ohio Revised Code, Sections 2315.16 and 2315.17) to petitioner's action under the Federal Employers' Liability Act is a rule of local procedure in direct conflict with his federal rights pronounced by this Court that in determining the legal sufficiency of a finding of an unsafe place to work, a reviewing court must search the record and give weight to the factors and circumstances as a whole. *Union Pacific Company v. Hadley*, 246 U. S. 330, 38 S. Ct. 318 (1918); *Bailey v. Central Vermont Railway Company*, 319 U. S. 350, 63 S. Ct. 1062 (1943); *Blair v. B. & O. Railway Company*, 323 U. S. 600, 650 S. Ct. 545 (1945).

This application by the Supreme Court of Ohio of the common law of Ohio to defeat petitioner's clearly established federal right to a consideration of the evidence as a whole to support a general verdict in his favor is in contravention of several prior decisions of this Court.

In *Brown v. Western Railway of Alabama*, 338 U. S. 294, 70 S. Ct. 105 (1949), a rule of local procedure to all common law negligence actions was that the complaint of plaintiff is construed most strongly against the pleader. This rule was held by this Court to be a substantial deprivation of plaintiff's federal rights and a judgment for defendant on the pleadings was reversed.

In *Dice v. Akron, Canton and Youngstown Railroad Company*, 342 U. S. 359, 72 S. Ct. 312 (1952), and *Squire v. Wheeling and Lake Erie Railroad Company*, 342 U. S. 935, 72 S. Ct. 550 (1952), a rule of local procedure under Ohio law that a release obtained by misrepresentation was a matter in equity to be decided by the court on the basis

of clear and convincing evidence rather than constituting a submissible issue of fact for the jury was held by this Court to be a substantial deprivation of the petitioner's federal rights.

In *Panhandle and Santa Fe Railroad Company v. Arnold*, 353 U. S. 360, 77 S. Ct. 840 (1957), an application by the Texas Supreme Court of the common law of Texas, where the jury found generally for the plaintiff on the issue of unsafe place to work, but on specific findings rejected each specific specification of negligence contained in plaintiff's petition, and on these issues found for defendant, required of the court that the verdict of the jury be set aside and final judgment entered for the defendant, was held by this Court to constitute a rule of local practice in substantial deprivation of federal rights of the petitioner and thereupon held by this Court to be inapplicable to petitioner's verdict obtained in an action brought under the Federal Employers' Liability Act.

See also *McBride v. Toledo-Terminal Railroad Company*, 354 U. S. 517, 77 S. Ct. 1398 (1957), in which this Court in a per curiam opinion reversed a final judgment for the defendant railroad despite the conclusion by the Ohio Supreme Court that the jury's answers to special interrogatories submitted under the same statute as involved in the instant petition required that final judgment be entered for the respondent railroad company.

Petitioner's testimony that he needed assistance finds support in the record from respondent's witnesses Terry (R. 100), Polk (R. 90) and Ducato (R. 118). Petitioner's claim that he was unnecessarily hurried in his work is supported by his own testimony. These allegations of negligence submitted to the jury are entirely consistent with the answers to the interrogatories. It is reasonable to assume that the jury believed respondent negligent in re-

quiring petitioner to walk upon a protruding cross tie covered with grease and oil because petitioner had to work unassisted or hurried or both. To eliminate such testimony supporting a general verdict for petitioner by tests of exclusion rather than reconciliation constitutes an invasion of petitioner's federal rights. *Union Pacific Company v. Hadley, supra; Bailey v. Central Vermont Railway Company, supra; Blair v. B. & O. Railway Company, supra.*

It is respectfully contended, therefore, that in accordance with the past holdings of this Court, the rule of local practice in Ohio that the failure of the jury to find the defendant negligent in certain itemized specifications contained in the petition is to be construed most strongly against the petitioner should be reviewed by this Court in its application to rights granted petitioner under the Federal Employers' Liability Act as interpreted by this Court.

Question No. 2.

After having limited petitioner's right to recover on his general verdict to a sufficiency of the evidence on the single ground of negligence found by the jury in answer to the interrogatories submitted to it, thereby eliminating all other proof of negligence in the record, the Supreme Court of Ohio then proceeded to hold that the jury was not justified from the evidence in concluding that there was oil or grease on the crosstie where plaintiff was required to work.

In determining the proof of negligence required of a defendant railroad company under the Federal Employers' Liability Act the Supreme Court of Ohio expressly relied upon the authority of *Brady, Administratrix v. Southern Railway Company*, 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct.

232 (1943), a five-four decision of this Court. The Supreme Court of Ohio chose to ignore the many recent decisions of this Court determinative of the degree of responsibility to be imposed upon a railroad company under the Federal Employers' Liability Act subsequent to the Brady case by the following comment without citation of authority:

> "We are aware that the Supreme Court of the United in recent years has been liberal, to say the least, in upholding the recovery of damages by injured employees in actions brought under the Federal Employers' Liability Act. However, by applying the principles of law above outlined, which we will assume have not been abandoned, to the instant action, we are of the opinion that plaintiff herein failed to make out a case of liability against the defendant, and that the findings of the jury with respect to negligence in response to the interrogatories submitted to it are not substantiated by the evidence."

It is respectfully contended that the foregoing is contra to the more modern and recent mandates of this Court modifying the doctrinal basis of the Brady decision in construing the Federal Employers' Liability Act. See *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457 (1957); *Lavender v. Kurn, et al.*, 327 U. S. 645, 66 St. Ct. 740 (1946).

The following is from the majority opinion in the *Brady* case, *supra*:

> "An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedents' estate, *based upon reason* is of no doctrinal importance." (Emphasis added.)

That this view no longer prevails is evidenced by the following from the majority opinion in the *Rogers* case, *supra*:

> "Under this statute the test of a jury case is simply whether the proofs justify *with reason* the conclusion that the employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (Emphasis added.)

It is respectfully urged that the within writ be granted so that this Court may correct the erroneous doctrinal basis on which Federal Employers' Liability Act cases must currently be litigated in Ohio.

From the foregoing authorities, clearly if the evidentiary basis for the jury's verdict may be found in the record it was the duty of the Ohio Supreme Court to affirm the judgment of the Court of Appeals of Cuyahoga County, Ohio, which in turn had already affirmed the judgment of the trial court.

Question No. 3.

As already noted the jury in answer to the special interrogatories submitted to it by respondent found respondent chargeable with negligence in two respects which were combined in a single answer. Respondent was found negligent in requiring plaintiff to (1) walk on a crosstie which was covered with grease or oil and (2) that he was required to walk on a tie elevated a substantial distance above the ground level. The evidence was undisputed as to the latter finding. There could be no basis therefore, for a holding by the Supreme Court of Ohio that this portion of the jury's finding was not supported by the evidence nor that any insufficiency of evidence existed with regard to it. The Supreme Court of Ohio did hold, however, that such a protrusion of a tie does not constitute

negligence at all. Thus, in its opinion the Supreme Court of Ohio stated:

> "Surely the defendant can hardly be held to the duty of going over the premises of another railroad with a fine-tooth comb to discover every imperfection thereon before sending its employees there to do a job for which they have been trained and where they might expect to meet conditions to be found in the operation of railroads generally."

It is respectfully contended at the outset that the jury could find with reason that the existence of the protruding crosstie under the peculiar hazards petitioner was required to work under constituted an unnecessary hazard to the safety of his person. Considering the soft, muddy nature of the ground area wherein plaintiff was required to perform his duties, the jury could easily have inferred from the existing record that it would have been a simple matter for the wreck master to have ordered the dirt to be banked so as to level off the area by the crossties where the out-rigger blocks were being placed inasmuch as the necessary tools were available at the work site (R. 142) and the ties did protrude a substantial distance above ground level. This is especially so in view of the testimony that there was no emergency or hurry in performing the work (R. 141). Such an inference would not require any minute inspection of the entire track of the railroad as indicated by the Supreme Court of Ohio, but only of that small area wherein the out-rigger blocks were being placed and which was then under the direct control of respondent's wreck master, who was petitioner's superior at the work site.

The holding of the Ohio Supreme Court in the instant case is inconsistent with its own earlier holding in *T. C. & C. Railroad Company v. Frick*, 14 Oh. CC. 453 (1893).

affirmed 51 Oh. St. 575, in which plaintiff was engaged in coupling and uncoupling moving cars when he caught his feet in the space between ties and alleged as negligence the failure of defendant to fill the open spaces between its track ties projecting outside the rails of its track to prevent employees catching their feet. A judgment in that case for plaintiff was affirmed, the opinion stating:

> "It seems that in attempting to step on the ties, instead of stepping on them he stepped between them. It should be remembered that these ties are nearly the whole width of a tie above the grade."

Authorities of this Court to the same effect are *Lavender v. Kurn, et al.*, 327, U. S. 645, 66 S. Ct. 740 (1946), where the fact that the ground where plaintiff was required to work was high and uneven was considered to be sufficient evidence to support a finding for plaintiff; *Webb v. Illinois Central Railroad Company*, 352 U. S. 512, 77 S. Ct. 451 (1957), plaintiff recovered for stepping on a clinker by a crosstie.

The position of the Ohio Supreme Court that the protruding crosstie cannot be negligence because it is a condition found in the operation of railroads generally is irreconcilable with the decision of this Court in *Gibson v. Thompson*, 355 U. S. 18, 78 S. Ct. 2 (1957), wherein petitioner was held to have a cause of action when he slipped on loose ballast by the crosstie.

The position of the Ohio Supreme Court that the protruding crosstie cannot be negligence, although the jury specifically found to the contrary, because otherwise an unreasonable burden of inspection is imposed upon respondent is the same line of reasoning recently advocated by the Missouri Supreme Court and repudiated by this Court. Thus, in *Ferguson v. St. Louis-San Francisco Rail-*

road Company, 307 S. W. 2d 385 (Mo. 1957), in which petitioner stepped backwards and fell in a drainage ditch, the Missouri Supreme Court, to support a judgment affirming a directed verdict for the defendant railroad held:

> "It is a well-known fact that all railroad tracks and yards are beset with embankments, drainage ditches, culverts, and other offsets and that it would be impracticable to have guard rails at all such places for the protection of employees."

It was the opinion of this Court that this decision of the Missouri Supreme Court was prejudicially erroneous to the federal rights of the petitioning employee. A per curiam opinion, *Ferguson v. St. Louis-San Francisco Railroad Company*, 356 U. S. 41, 78 S. Ct. 671 (1958), held:

> "We hold that the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the petitioner's injury."

It would thus appear clear that the Supreme Court of Ohio has failed to follow the mandate of this Court, but instead has substituted its own judgment for that of the jury as to whether the existence of the protruding crosstie under the peculiar circumstances of plaintiff's employment constituted employer negligence which played a part in producing petitioner's injury.

All of the foregoing authorities were cited to the Supreme Court of Ohio for consideration by the instant petitioner.

Question No. 4.

The opinion of the Ohio Supreme Court determined as a matter of law that the proofs did not justify the specific finding that oil or grease was present at the crosstie. The opinion of the court states as follows:

"The existence of oil on the crosstie is at best problematical, and, if there was oil present, there was no showing that defendant placed it there, knew about it, or, in the exercise of ordinary care should have known about it."

The substantial evidence that the oil was there is the testimony of plaintiff that he observed the grease and oil only on his right shoe after the accident (R. 55); that he had the sensation of slipping while tugging at the outrigger block with his right foot on the crosstie (R. 53); that neither he nor his fellow employees were troubled with grease or oil or slipping at any other time during the working night, (R. 57); that the section foreman dispatched to the very area where the occurrence took place for the express purpose of inspecting the area found grease on the track ties where the switches are lubricated, (R. 149). This is surely a sufficiency of evidence of the existence of the grease or oil within the province of the jury to make inferences in cases brought under the Federal Employers' Liability Act. See *Schultz v. Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Lavender v. Kurn, et al.*, 327 U. S. 645, 66 S. Ct. 740 (1946). See also the majority opinion of the Court of Appeals of Cuyahoga County, Ohio (App. A).

It is equally clear that the presence of grease or oil at the work site may be found by the jury to constitute negligence within the meaning of the Federal Employers' Liability Act. See *Beattie v. Elgin, Joliet and Eastern Railway Company*, 217 F. 2d 863 (7 CCA 1955); *Wilkerson v. McCarthy, et al.*, 336 U. S. 53, 61 S. Ct. 413 (1949); *Henwood v. Chaney*, 156 F. 2d 392 (8 CCA 1946), certiorari denied, 329 U. S. 760, 67 S. Ct. 113 (1946). Compare *Placanica v. Riach Oldsmobile Co.*, 332 P. 2d 47 (Wash. 1958), oil under snow and ice proved by Plaintiff's

testimony that he found oil on his coat an hour after he fell.

It has been well established by many authorities that under the Federal Employers' Liability Act the duty to provide plaintiff with a reasonably safe place to work is nondelegable and follows him to a foreign work site. *Kooker v. P. & L. E. Railroad Company*, 258 F. 2d 876 (6 CCA 1958); *Butz v. Union Pacific Railroad Company*, 233 P. 2d 332 (Ut. 1951); *Van Horn v. Southern Pacific Railroad Company*, 297 P. 2d 479 (Cal. 1956); *Beattie v. Elgin, Joliet and Eastern Railway Company*, 217 F. 2d 863, (7 CCA 1955); *Chicago, Greatwestern Railroad Company v. Casura, et al.*, 234 F. 2d 441 (8 CCA 1956).

In fact the Ohio Supreme Court itself recognized this obligation as pronounced in *Elkins v. Wheeling and Lake Erie Railroad Company*, 160 Oh. St. 47, 113 N. E. 2d 233 (1953), especially the fourth paragraph of the syllabus which reads as follows:

> "Syllabus 4. Under the Federal Employers' Liability Act a railroad company owes his employees the duty of furnishing a reasonably safe place to work, and this duty continues even though the employee to do his work is sent upon the premises of another."

In the instant case it is clear that the jury could have found from the evidence that respondent's wreck master Mike Gupko, who was present at the work site for the express purpose of supervising the work of petitioner and his fellow laborers, could and should have inspected the work site and eliminated the dangerous condition which the jury found constituted an unsafe place for plaintiff to work; that it was negligence on the part of the respondent to require plaintiff to work under such conditions.

The holding by the Ohio Supreme Court in the instant case that there is no evidence that respondent could and

should have discovered these dangerous conditions is not supported by the record and constitutes an invasion of the province of the jury as a finding to the contrary could clearly be made from the record. Thus, in *Beattie v. Elgin J. & E. Railroad Company, supra*, the opinion states:

> "As already stated the duty is a continuing one, and notice of defects and dangers will be imputed to the master where they could have been discovered by reasonable inspection and by exercise of reasonable care."

To the same effect see *Chicago, Greatwestern Railroad Company v. Casura, et al., supra*:

> "* * * Under the evidence, viewed in the light most favorable to the plaintiff (the jury), was warranted in believing not only that the place where plaintiff was required to work was not a safe place, but that the railway company failed to exercise ordinary care to discover the unsafeness of the place in which plaintiff was required to work and to use ordinary care to have made it into a reasonably safe place."

All of the foregoing authorities concerned fact situations where an employee under the Federal Employers' Liability Act sustained injuries while working on foreign premises.

Question No. 5.

In addition to its holding that as a matter of law the evidence was insufficient to charge respondent with liability, the opinion in the instant case seeks to reestablish that in a Federal Employers' Liability Act case the defense of assumption of risk is still available. Thus the opinion of the Ohio Supreme Court contains the following statement:

"To us it appears that plaintiff encountered an ordinary risk in the course of his accustomed employment, and that there is insufficient evidence as a matter of law to charge the defendant with responsibility for his misfortune."

It is fundamental that all vestiges of the defense of assumption of risk had been abolished in an action brought under the Federal Employers' Liability Act. *Texas and Pacific Railway Company v. Buckles*, 232 F. 2d 257 (5 CCA 1956), certiorari denied, 351 U. S. 984, 76 S. Ct. 1052 (1956); *Tiller v. Atlantic Coast Line Railroad Company*, 318 U. S. 54, 63 S. Ct. 444 (1943). It is of the utmost urgency that the instant petition for writ of certiorari be granted to prevent the reappearance of this abolished defense in actions brought in the State courts of Ohio under the Federal Employers' Liability Act.

This is not a case of an unforeseeable instantaneous change in climatic conditions which could not have been guarded against. The inclement weather conditions under which petitioner was required to perform his work unassisted existed for at least four hours prior to the time of injury. The inclement weather was another condition which respondent within the realm of foreseeability should have protected petitioner against, at least to the extent practicable, which would include the elimination of the unnecessary hazards to petitioner's safety which the jury found to exist in its special finding on the interrogatories. See *Fort Worth and Denver City Ry. Co. v. Smith*, 206 F. 2d 667 (5 CCA), and *Anderson v. Elgin, Joliet and Eastern Ry. Co.*, 227 F. 2d 91 (7 CCA).

Instead of requiring of respondent that it protect the petitioner in so far as practicable from the additional hazard of inclement weather, the Supreme Court of Ohio, in effect, has foisted upon petitioner the additional bur-

den of assuming the risks of inclement weather and other static conditions which could have been guarded against. The jury by its answer to the interrogatories found that the accident was not unavoidable.

CONCLUSION.

The Supreme Court of Ohio upon judicial review of this case felt free to place its own restrictive interpretation upon special findings by the jury—an interpretation most favorable to the respondent whose interrogatories prompted such findings. By so doing the court instead of construing the special findings on the interrogatories as being in support of a general verdict for the petitioner, as was clearly the intent of the jury, chose instead to construe the special findings strictly against the petitioner by its holding that the jury thereby expressly found that none of the other specifications of negligence contained in petitioner's original petition existed, which was accomplished by application of a rule of local procedure.

By applying this rule of local practice peculiar to the common law of Ohio, petitioner has been deprived of his substantial federal right of trial by jury on the record as a whole, which this Court by its decisions has granted him.

In addition the Supreme Court of Ohio by its holding in the instant case in the light of the existing record has refused to follow the repeated mandates of this Court as first pronounced in *Lavender v. Kurn, et al., supra*, that the appellate court's function is exhausted when the evidentiary basis for the jury's verdict becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. Instead the Supreme Court of Ohio has reweighed the evidence which was carefully considered by the jury, the trial judge in the various motions filed by respondent, and

the Court of Appeals, all of which affirmed the general verdict for petitioner.

Finally the Supreme Court of Ohio has reinstituted into Federal Employers' Liability Act cases brought within the state courts of Ohio the defense of assumption of risk.

The foregoing patently erroneous applications of petitioner's federal rights in the instant case constitute fundamental errors of law which prompt correction and review by this Court.

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays of this Court that his petition for writ of certiorari to the Supreme Court of Ohio be granted by the Supreme Court of the United States; that judgment be thereupon entered by the Supreme Court of the United States as a reversal of the judgment of the Supreme Court of Ohio; that this Court reinstate the verdict of the jury reduced to judgment by the trial court in favor of petitioner in the sum of Twenty-Five Thousand Dollars ($25,000.00) with interest accrued according to law; and that a mandate issue by the Supreme Court of the United States to the Supreme Court of Ohio to accordingly reinstate the judgment for plaintiff.

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Attorney for Petitioner.

APPENDIX A.

Opinion of the Supreme Court of Ohio.

HARRIS, APPELLEE, *v.* PENNSYLVANIA RD. CO., APPELLANT

Federal Employers' Liability Act—Employee's action against employer in state court—Substantive law of federal courts applicable—Employer's liability based on negligence—Sufficiency of evidence.

1. In an action for the recovery of damages brought in a state court by an employee against his employer under the Federal Employers' Liability Act (Section 51 *et seq.*, Title 45, U. S. Code), the substantive law announced by the federal courts and particularly the Supreme Court of the United States must be applied.
2. The employer is not an insurer of his employee's safety, and to impose liability on the former in such an action it is necessary to show negligence on his part and that such negligence was a proximate cause of the injury complained of.
3. In such an action, evidence which raises only a speculation or conjecture of negligence is not sufficient to support a verdict against the employer, and, under the Federal Employers' Liability Act, the weight of the evidence must be more than a scintilla before the case may properly be left to a jury for determination.

(No. 35600—Decided March 11, 1959.)

APPEAL from the Court of Appeals for Cuyahoga County.

Admittedly the present action is governed by the Federal Employers' Liability Act (Section 51 *et seq.*, Title 45, U. S. Code). It was instituted in the Court of Common Pleas of Cuyahoga County by Henry J. Harris, hereinafter referred to as plaintiff, against the Pennsylvania Railroad Company, hereinafter designated as defendant.

Plaintiff seeks damages for an injury to his back which he received in the course of his employment by

defendant and which he claims was attributable to defendant's negligence in respects set out in his petition. In its answer, defendant denies the material allegations of the petition.

A jury trial was had which resulted in a verdict and judgment for plaintiff in the sum of $25,000. Defendant's motions, respectively, for a new trial, for judgment on certain findings of fact made by the jury in response to interrogatories and for judgment notwithstanding the verdict were overruled.

An appeal on questions of law was then taken by the defendant to the Court of Appeals which by a divided vote affirmed the judgment below.

The cause is presently in this Court for decision on the merits, pursuant to the allowance of defendant's motion to require the Court of Appeals to certify the record.

Additional facts are stated in the opinion.

Mr. A. H. Dudnik and *Mr. Marshall I. Nurenberg*, for appellee.

Messrs. Hornbeck, Ritter & Victory and *Mr. Donald E. Ryan*, for appellant.

ZIMMERMAN, J. The injury complained of occurred on the sleety, wet and sloppy early morning of March 28, 1953. On the evening of the previous day, plaintiff had been summoned by defendant to serve as a member of a "wreck train crew" to assist in retracking two derailed boxcars which had left the tracks of the Nickel Plate Railroad at the Northern Ohio Food Terminal near East 39th Street and Broadway Avenue in the city of Cleveland. One of the cars was retracked by the use of a derrick and four outriggers, two at either end of the derailed car. The outriggers were supported from beneath by wooden blocks of varying sizes. After the first car had been successfully re-

tracked, it became necessary to move the equipment to repeat the operation as to the other car. It was during this moving operation that plaintiff was hurt. He claims that as he was attempting to lift an outrigger support block out of the mud with his right foot on an elevated crosstie the block "all at once it jump out of the mud and I slipped on the crosstie that I was standing next to, a tie—I couldn't get no good grip, I was so close to it. So when I slipped on the crosstie, that is when I got that catch in my back." No one else witnessed this incident, and plaintiff was the only one to testify directly concerning it.

Although later on plaintiff varied this account somewhat as to just when he slipped in relation to lifting the wooden outrigger support, he adhered fairly closely to the account of the happening as contained in the testimony quoted above.

Plaintiff's principal claim of negligence against defendant is that it failed to afford him a reasonably safe place to work, (1) because of the elevated crosstie on which he slipped—it extended some five inches above the roadbed—and (2) because this crosstie had grease on it, which was responsible for plaintiff's slipping and the resultant injury to his back.

The only evidence in support of plaintiff's contention that there was grease on the crosstie is his testimony that after the injury he observed grease on his right shoe. During plaintiff's cross-examination, the following questions were asked and answered:

"Q. Well, did you slip? You slipped on a tie? A. That's right.

Q. Is that the reason you hurt your back? A. That is the way I got hurt when I slipped, and the mud was sloppy and the mud was on my feet.

Q. Grease, too? A. Grease is under the mud.

Q. Grease under the mud? A. Yes.

Q. You never looked at it? A. I look at it after I got the block out; I was lay flat on my back.

Q. You said you never looked at the tie? A. How could I look on the block if it was turned? There was grease and mud on my shoe.

Q. There was grease on the block? A. Grease under the mud because it was on the right side of my feet, under the shoe.

Q. How much grease was there? A. I don't know how much grease there was. There was enough for me to tell you.

Q. You didn't see any grease on that tie? A. There was mud.

Q. There was mud all around there if it was raining as hard as you say it was. A. It was raining and sleet and sloppy.

* * *

Q. You can see mud on the tie, too? A. There was grease on the tie.

Q. How do you know? A. It was on my foot.

Q. Does that mean it was on the tie? A. There was mud on the tie.

Q. You could have picked it up any place? A. Well, I don't know.

Q. You don't know. You didn't know if it was on that tie? A. It was on the tie.

Q. You didn't see that tie? A. It was on the mud.

Q. Did you see it? A. It was over my shoe, that is the way I saw it was on there.

Q. You saw it on your shoe. Does that mean it was on the tie? A. By my picking the tie up, it could have come from the tie, from the one I slip and fell upon.

Q. It could have come from any place around there, couldn't it? A. Well, it could have, but it was there on the tie.

Q. But you say you didn't see it on the tie? A. It was on my shoe.

Q. My question is: Then it could have come from

any place around where you were walking that night? A. Well, I could say that, too, but it was on my shoe.

Q. That is the only thing you are sure of? A. That's right."

At the request of defendant, the following interrogatories were submitted to and answered by the jury:

"I. Was the defendant negligent?

Answer: Yes.

"II. If your answer to number I is 'Yes,' state of what that negligence consisted.

"In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing."

In any case brought in a state court, where the Federal Employers' Liability Act applies, the substantive law as laid down by the federal courts and particularly the Supreme Court of the United States is controlling. It would hardly be practical and we think it is unnecessary to cite and comment on many of those cases. However, in perusing them, certain principles of law are discernible, and the important ones may be summarized as follows:

1. The Federal Employers' Liability Act does not make the employer an insurer of his employees' safety when such employees are rendering services for him. The basis of liability is negligence, which is not shown by the mere fact that an injury occurs. *Ellis v. Union Pacific Rd. Co.*, 329 U. S., 649, 91 L. Ed., 572, 67 S. Ct., 598.

2. Under the act, the weight of the evidence must be more than a scintilla before the case may properly be submitted to a jury for determination. *Brady, Admx. v. Southern Ry. Co.*, 320 U. S., 476, 88 L. Ed., 239, 64 S. Ct., 232.

3. Evidence which raises only a speculation or a conjecture of negligence on the part of a defendant-employer is not sufficient to support a verdict imposing liability on him. The burden of proof rests upon the plaintiff, and there must be enough evidence to show negligence and that such negligence was a proximate cause of the injury. *Atchison, Topeka & Santa Fe Ry. Co. v. Toops, Admx.*, 281 U. S., 351, 74 L. Ed., 896, 50 S. Ct., 281; *Atchison, Topeka & Santa Fe Ry. Co. v. Saxon, Admr.*, 284 U. S., 458, 76 L. Ed., 397, 52 S. Ct., 229; *Chicago Great Western Rd. Co. v. Rambo, Admx.*, 298 U. S., 99, 80 L. Ed., 1066, 56 S. Ct., 693; *Moore, Admx., v. Chesapeake & Ohio Ry. Co.*, 340 U. S., 573, 95 L. Ed., 547, 71 S. Ct., 428. See, also, *Bevan v. New York, Chicago & St. Louis Rd. Co.*, 132 Ohio St., 245, 6 N. E. (2d), 982 (certiorari denied, 301 U. S., 695, 81 L. Ed., 1351, 57 S. Ct., 924), and the cases decided by the Supreme Court of the United States cited therein.

We are aware that the Supreme Court of the United States in recent years has been liberal, to say the least, in upholding the recovery of damages by injured employees in actions brought under the Federal Employers' Liability Act. However, by applying the principles of law above outlined, which we will assume have not been abandoned, to the instant action, we are of the opinion that plaintiff herein failed to make out a case of liability against the defendant, and that the findings of the jury with respect to negligence in response to the interrogatories submitted to it are not substantiated by the evidence.

The rule prevailing in Ohio and elsewhere is that, where, in a negligence action, an interrogatory is submitted to the jury, in which the jury is asked to specify what acts of negligence, if any, are chargeable to the defendant, only those acts specified by the jury in its answer should be considered, and it will be accepted that other claimed acts

of negligence on the part of the defendant were found by the jury not to have been established. *Masters v. New York Central Rd. Co.*, 147 Ohio St., 293, 70 N. E. (2d), 898 (certiorari denied, 331 U. S., 836, 91 L. Ed., 1848, 67 S. Ct., 1519; rehearing denied, 332 U. S., 786, 92 L. Ed., 369, 68 S. Ct., 33).

Surely the defendant can hardly be held to the duty of going over the premises of another railroad with a fine tooth comb to discover every imperfection thereon before sending its employees there to do a job for which they have been trained and where they might expect to meet conditions to be found in the operation of railroads generally.

To us it appears that plaintiff encountered an ordinary risk in the course of his accustomed employment, and that there is insufficient evidence as a matter of law to charge the defendant with responsibility for his misfortune. The position of the crosstie, slightly elevated above the roadbed, was known to plaintiff and is a condition of common occurrence on all railroads. The existence of oil on the crosstie is at best problematical, and, if there was oil present, there was no showing that defendant placed it there, knew about it, or, in the exercise of ordinary care, should have known about it.

Of course plaintiff's unfortunate accident is to be deplored, but sympathy may not be substituted for the evidence needed to win a lawsuit. Occasions do arise under the Federal Employers' Liability Act where defendants possess rights which should be protected, and we think this is one of them. If in any action, the plaintiff fails to make a case against the defendant by the required amount and character of evidence, the defendant is entitled to prevail by way of a directed verdict or by judgment notwithstanding the verdict.

In our view, defendant should have had a directed verdict in its favor or judgment notwithstanding the verdict, in response to its motions, on the ground that negligence on its part was not sufficiently shown by the evidence to warrant recovery. Accordingly, the judgment of the Court of Appeals is reversed, and final judgment is rendered for defendant.

Judgment reversed.

WEYGANDT, C. J., STEWART, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

APPENDIX B.

Majority Opinion of the Court of Appeals.

(December 31, 1957.)

KOVACHY, J.:

Henry J. Harris filed this action in the Court of Common Pleas of Cuyahoga County for injuries incurred while employed as a member of a wreck train crew of the Pennsylvania Railroad Company on tracks of the Nickel Plate Railroad. His action is based on the Federal Employers' Liability Act, 45 U. S. C. A., Section 51-59, and amendments thereto. A jury rendered a general verdict in his favor for $25,000 on which judgment was entered. Motions by defendant for (1) an order vacating and setting aside the verdict of the jury and for an order for judgment notwithstanding the verdict of the jury, (2) judgment on findings of facts, and (3) new trial, were overruled by the trial court. Defendant appeals these rulings to this court on questions of law. The injuries are not in dispute.

Defendant's assignment of error No. 1 is that: "The trial court erred by its failure to grant final judgment for the defendant by reason of the fact that the verdict of the jury was inconsistent with the finding of fact timely submitted by the defendant and answered by the jury."

Pursuant to Section 2315.16 of the Revised Code of Ohio, the jury returned findings on particular questions of fact as requested by the defendant. They found that the defendant was negligent "in that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording an unstable footing." This finding of fact was an exact adoption by the jury of specification No. 3 of the plaintiff's petition.

To test the correctness or incorrectness of the ruling of the court on the motion here involved, we are required to consider the evidence in the record in the most favorable light to the plaintiff.

In seeking to have the court sustain his first assignment of error, the defendant contends that there was "absolutely no evidence concerning the presence of oil or grease on the cross-tie where plaintiff claims he was injured," and that as a consequence, the verdict of the jury was inconsistent with their finding of fact and requires a reversal. We do not agree with this contention.

In *Klever vs. Reid Brother Express, Inc.*, 151 O. S. 467, 86 N. E. 2d 608, the Supreme Court held:

> "1. It is the duty of a court to harmonize, if possible, special finding of a jury with its general verdict."

Also in *Elio vs. Akron Transportation Co.*, 147 O. S. 363, 370, 71 N. E. 2d, 707, 711, the court said:

> "Nicety in the use of terms is not required of the jury in answering interrogatories so long as the court is able to gather the intent of the jury from its answer."
>
> "* * *. *Such answer should be liberally construed with a view to ascertaining the jury's reason for its verdict.*" (Emphasis ours.)

In *Lavender, Adm. v. Kurn*, 327 U. S. 645, the United States Supreme Court held:

> "4. Only when there is a *complete absence* of probative facts to support the conclusion reached does reversible error appear." (Emphasis ours.)

Headnotes 3 and 4 in *Beattie vs. Elgin, Joliet and Eastern Ry. Co.*, 217 F. 2d 863, U. S. Court of Appeals, Seventh Circuit, read:

> "Standard of care required of employer in furnishing employee safe place to work must be com-

mensurate with dangers of the business and duty to provide safe place becomes more imperative as risk increases.

"Employer's duty to use reasonable care to furnish employee with safe place to work is a continuing duty from which employer is not relieved by fact that employee's work at place in question is fleeting or infrequent or fact that employee is sent to premises not belonging to or under control of employer."

Also in *Bailey, Admx. vs. Central Vermont Ry., Inc.*, 319 U. S. 350, the court held:

"In this suit under the Federal Employers Liability Act, brought in a state court against a carrier to recover damages for the death of an employee, the evidence was sufficient to go to the jury on the question whether, as alleged in the complaint, the defendant was negligent in failing to use reasonable care to furnish the employee a safe place to work."

Again in *Webb vs. Illinois Central Railroad Co.*, 352 U. S. 512, it was held:

"a) The test of a jury case under the act is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury."

The guiding principles of law in resolving this assignment of error, therefore, are: (1) a liberal construction of the findings of fact with the view of harmonizing them with the general verdict as pronounced by the Ohio Supreme Court; and (2) the slightest evidence of negligence on the part of a defendant in not using reasonable care to furnish employee with a safe place to work, even though employee's work is fleeting and is on premises not belonging to or under control of employer, is sufficient to sustain a jury verdict in favor of a plaintiff under the Federal Employers' Liability Act as interpreted by the Circuit

Courts of Appeals and the Supreme Court of the United States.

By their findings of fact, the jury in this case, in effect, found that the defendant was negligent in failing to use reasonable care to provide the plaintiff a safe place to work in that he was required to work on a cross-tie that was elevated a substantial distance above the ground level while said tie was covered with grease or oil, affording unstable footing. We find substantial evidence in the record to support these conclusions.

The plaintiff was called to work in the night season to join his wreck train crew in arighting two derailed boxcars. Rain and sleet was falling. The boxcars were to be lifted back on the track by the use of a derrick car. The derrick car, when operating, was supported by four out-riggers, two on each end. These out-riggers were stabilized by blocks of wood under them. One boxcar had been arighted, making it necessary to transfer the derrick and out-rigger blocks in position to aright the second boxcar. It was during this operation that the plaintiff was injured. He was required to remove the bottom-most block under one of the out-riggers. The block was one foot wide, one-half foot thick, four feet long and weighed close to one hundred pounds and had sunk into the mud to a depth of 4 or 5 inches. It lay parallel to the tracks, with the end required to be extracted from the mud, immediately adjacent to and contiguous with a cross-tie which protruded some five inches above the ground. The tie, according to the plaintiff's testimony, was covered with mud with grease or oil under the mud. Plaintiff's foreman walked by and upon plaintiff's asking for help to extract the block, was told: "You are a big, strong man—we are busy. Hurry up." Two co-workers, testifying for the defendant, said that it was difficult for one man to cope with such a situa-

tion alone. Plaintiff testified that the only way he was able to extricate the block under the circumstances was to put one foot on the tie and another on the ground and to tug away, saying, "It was so close to the cross-tie you couldn't hardly get no position to stand to pull it out of the mud." He also testified that as "it jumped out of the mud" and he was about to place it on his shoulder, his right foot, which was on the tie, slipped and caused him to injure his back. The record further discloses that no one experienced any slipping that day but the plaintiff and that a section foreman inspected the tracks the following day in the area where the wreck crew had worked and saw grease "where we keep the switches lubricated."

It seems to us that from these facts the jury with reason could determine that the defendant was negligent in requiring plaintiff to proceed alone in extricating the block under circumstances which required that he place one foot on a tie covered with mud and grease or oil and the other foot on the ground five inches lower. It is common knowledge that the foot on the lower level, under these circumstances, would carry the greater weight and that the foot on the tie, by reason of the resulting imbalance, would be likely to slip on the mud and grease or oil. Yet the foreman who saw, or in the exercise of reasonable care, should have seen this hazardous situation, permitted the plaintiff to continue without help or even a warning as to the danger facing him.

Defendant maintains that since the plaintiff did not categorically testify that he saw grease or oil on the cross-tie that "there is absolutely no evidence concerning the evidence of oil or grease on the cross-tie." In making this statement, defendant closes its eyes to plaintiff's statement, reiterated several times, that he knew there was grease or oil under the mud because his right shoe, the one that was

planted on the tie, had grease upon it while his left shoe, the one planted on the ground, had only mud upon it. The jury may well have reasoned that grease would have been found on both shoes had grease been present on the ground other than on the tie and that since the plaintiff saw it only on the shoe that had been on the tie, the jury could have inferred that it came from the tie. This testimony, considered with the obvious fact that a foot slipping on a surface gives such a person some feeling as to whether the slipping is due to mud or grease or oil, together with the answers of the plaintiff (no less than ten times) that there was "grease on the tie" would justify a jury finding that there was grease or oil on the tie. After all, the jury saw and heard the witness and was in a position to determine the credit and the weight to be given his testimony. Moreover, they had the right to draw fair and reasonable inferences from the testimony in the light of all surrounding circumstances. This was their function under the law, and, to hold, in view of this state of the record, that there was insufficient evidence to support the findings of fact would, in our opinion, be tantamount to denying this plaintiff the right to have his complaint passed upon by a jury, a clear right accorded him under the Federal Employers' Liability Act.

In *Bailey vs. Central Vermont Ry., Inc., supra*, the court said at page 354:

> "* * * To deprive these (railroad) workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Wilkerson vs. McCarthy*, 336 U. S. 53, 55, the court said:

> "This Court has previously held in many cases that where jury trials are required, courts must submit the

issues of negligence to a jury if evidence *might* justify a finding either way on these issues." (Emphasis ours.)

and *Lavender, Adm. vs. Kurn, supra*, the court held:

"2. There being a reasonable basis in the record for an inference by the jury that the injury resulted from the defendant's negligence, it is not within the province of the appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from that reached by the jury.

"3. In suits under the Federal Employers' Liability Act, the appellate court's function is exhausted when the evidentiary basis for the jury's verdict becomes apparent, it being immaterial that the court might draw a contrary inference or consider another conclusion more reasonable.

"4. Only when there is a *complete* absence of probative facts to support the conclusion reached by the jury does reversible error appear." (Emphasis ours.)

And at page 653, the court said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

See *Arnold vs. Panhandle and Santa Fe Ry. Co.*, 353 U. S. 360; *McBride vs. Toledo Terminal Railroad Co.*, 354 U. S. 517; *Ringhiser vs. Chesapeake & Ohio Ry. Co.*, June 10, 1957, 354 U. S. 901.

It seems to us, moreover, that, under the circumstances disclosed in the record, the defendant should have anticipated the plaintiff injuring himself when he was required to stand with one foot on a tie raised five inches

about the ground and covered with mud and grease or oil and the other foot on the ground while tugging at a heavy timber imbedded in the ground. Defendant's foreman should have either ordered assistance for him, or provided that the mud and grease or oil be removed or its slickness reduced in some way. In any event, we conclude that fair-minded men and women could reasonably conclude from such evidence that the employer failed to exercise reasonable care to see that its employee had a safe place in which to work and that as a consequence it was negligent.

In *Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500, 503, the court said:

> "These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, did sustain just such an injury as he did."

We believe, therefore, that the findings of fact made by the jury were supported by the record and were consistent with the general verdict rendered by them.

Defendant's assignment of error No. 2 that "The trial court erred in overruling defendant's motion to strike certain specifications of negligence from plaintiff's petition" and assignment of error No. 3, that "The trial court abused his discretion in overruling defendant's motion for a new trial on the ground that the verdict of the jury and the judgment of the court were contrary to law" are not well taken and are overruled.

Consistent with the foregoing, the Court of Common Pleas was not in error in overruling a motion for an order setting aside the verdict of the jury and for judgment notwithstanding the verdict of the jury, a motion for judgment on findings of fact, and a motion for new trial. Hence the judgment of said court is affirmed.

HURD, J., concurs. SKEEL, J., dissents.

Dissenting Opinion of the Court of Appeals.

(December 31, 1957.)

SKEEL, *P. J.* (Dissenting):

I am unable to agree with the conclusions reached by the majority of this Court. The action is one for personal injuries, it being the claim of plaintiff that the defendant negligently caused his injuries within the purview of the Federal Employers' Liability Act.

A restatement of the facts, at least in part, seems desirable to clearly present the issues. On March 29, 1953, the plaintiff was employed by the defendant upon a special assignment (aside from his usual work) as a member of a wreck train crew. He had reported for duty the evening before the accident at 7:15 P. M. to assist in retracking two freight cars that had been derailed on the tracks of the Nickel Plate Railroad at the Northern Ohio Food Terminal located at East Ninth and Broadway in Cleveland, Ohio.

At the time of the injury to plaintiff, which occurred at about 12:45 A. M. of the next day, one car had been retracked and work had been started on the second car. The plaintiff, with others, was blocking the out-rigging of the derrick car. The work consisted of carrying wooden blocks said to be 6"x12"x48", weighing 50 to 60 lbs., to be placed under the out-riggers. This was done to stabilize the derrick car when the derrick was in use. The block which plaintiff was attempting to pick up had been forced into the mud by the pressure of the out-rigger, stabilizing the derrick while retracking the first car. The evidence discloses that it was a wet, sleety night and the activity of the workers had created a muddy condition at the place of the work. The blocks to support the out-rigger were placed between the tracks (sometimes referred to as the devil strip), the bottom layer (three blocks in number) being

laid lengthwise beginning at the end of the ties of the track on which the derrick car was spotted. The plaintiff's testimony of how the injury took place in his case in chief was as follows:

"A. I couldn't get no grip on it because it was stuck in the mud. I started to tug. I asked the boss for some help. He said, 'You are a big strong man.' He said, 'We are busy. Hurry up.' So I start tugging the block, tug it and pull it, and so all at once it jump out of the mud and I slipped on the cross-tie that I was standing next to, a tie—I couldn't get no good grip, I was so close to it. So when I slipped on the cross-tie, that is when I got that catch in my back."

"* * *

"Q. Now, were you able to stand on the ground while you were tugging at this thing?

A. No, I had one feet on the cross-ties. There was no room, I can't stand on the ground, no room on the cross-tie. And one feet on the cross-tie and one next to the side of the tie, on the other side, my left foot.

Q. And was the cross-tie even with the ground?

A. The cross tie?

Q. Yes.

A. Well, that was about five inches off the ground.

Q. You mean the top of the cross-tie?

A. Yes.

Q. And was that block wet or dry, or what?

A. It was wet and slimy and sort of muddy-like.

Q. Did you feel any immediate pain in your back?

A. Yes, I did.

Q. Were you able t. finally pick the block up?

A. Yes, I finally pick the block up and took it over to the next guy, Joe Ducato, and he took it off my shoulder."

The allegations of negligence in plaintiff's petition are as follows:

(1) In that it refused his request for help and peremptorily ordered the plaintiff to pick up and carry said wood block without help.

(2) In that it hurried the plaintiff in said work.

(3) In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing.

(4) In that the defendant failed to exercise ordinary care to provide plaintiff with a reasonably safe place to perform his work.

The defendant requested a special finding of fact which was answered by the jury as follows:

"1. Was the defendant negligent?
Answer: Yes.

2. If your answer to Number 1 is 'Yes,' state of what that negligence consisted."

(Answer) "In that the tie of the track he was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing."

The errors claimed by the defendant are:

"1. The trial court erred by its failure to grant final judgment for the defendant by reason of the fact that the verdict of the jury was inconsistent with the finding of fact timely submitted by the defendant and answered by the jury.

2. The trial court erred in overruling defendant's motion to strike certain specifications of negligence from plaintiff's petition.

3. The trial court abused his discretion in overruling defendant's motion for a new trial on the ground that the verdict of the jury and the judgment of the court were contrary to law."

Section I of the Federal Employers' Liability Act provides:

> "Every common carrier by railroad, while engaged in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 45 U. S. C. Sec. 51."

The term negligence is not defined in the Act so that its meaning must be governed by common law principles as established and applied in the federal courts. The decisions of state courts, defining the meaning of negligence, can be of no help. The question is clearly and completely one to be determined by federal law. The Act, however, is one which bases liability on negligence. It is not a Workmen's Compensation Act where the right to participate in an insurance fund is dependent only on injuries sustained while acting in the course of the employee's employment and recovery is limited to compensation and not damages. The primary function of the Act was to require carriers by rail to exercise ordinary care in relation to the unusual hazards of railroading and to eliminate the common law defenses of assumption of risk, contributory negligence and the fellow servant doctrine. The greater degree of hazard associated with the industry requires greater vigilance by the employer to protect the safety of employees. The question here is—Was that which should or could have been done, in the practical operation of the system, in the exercise of proper care, omitted, which omission in part was a contributing or proximate cause of the injury sustained by the petitioner?

A clear statement of the basis of liability under the Act is found in *Illinois Central Railroad Co. vs. Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. ed. 528, where it was held:

> "* * * before a recovery can be had, it must be shown by either direct or circumstantial evidence that the railway company was negligent; or in other words, that it owed a care and failed to exercise it."

See also *Urie vs. Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. ed. 1282.

The authorities cited by the contending parties attempt to exemplify the meaning of the word negligence within the rule as thus stated. In each case the controversy has to do with determining whether the facts, when considered in their most favorable light to establish the responsibility of the carrier, are sufficient to permit the submission of the case to the jury on the question of negligence.

In the case of *Blair vs. Baltimore & Ohio Railroad Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. ed. 490, the basis of the alleged liability of the respondent was its failure to furnish tools reasonably suited to the work at hand as well as a safe place to work and to furnish competent help. It was also charged that the railroad's employees who were assigned to assist in the work at hand were incompetent under the circumstances. The petitioner, with others, was attempting to move three, 30', 10" tubes covered with grease and weighing 1,000 lbs. each, from a railroad car. Petitioner had reported to his superior that the tubes were too heavy for him to move. After his suggestion that the car should be consigned directly to the customer for want of proper equipment to unload and reload the pipes was rejected by petitioner's superior, he was told to get help and proceed with the work, which he did. In attempting to load the second pipe after the first

one had been successfully moved, the pipe slipped, causing the truck to kick back, injuring the petitioner. Under the facts of this case, it is said in the headnote of Vol. 65, Supreme Court, page 545, that:

> "Evidence that plaintiff, a freight handler, was assisted by a section man, aged 60, and a car inspector, 68, in moving through a warehouse, from freight car to motor truck, a greased 1,000 pound 10-inch steel tube about 30 feet long, by using a 5-foot nose truck about 2 feet high, and that the tube slipped and plaintiff's helpers released their holds, and the truck kicked back against plaintiff, was sufficient to take the railroad's negligence to the jury.
>
> "The negligence of a railroad under the Federal Employers' Liability Act may be determined by viewing its conduct as a whole, especially where the elements indicating negligence are closely interwoven, and where each imparts character to the others."

The case of *Wilkerson vs. McCarthy,* 336 U. S. 53, 69 S. Ct. 413, 93 L. ed. 497, wherein a switchman was injured while in the yard of the respondents in the furtherance of his duties, it was alleged by petitioner that in the course of his duties; he was required to walk over a wheel pit on a narrow boardway and that due to respondent's negligence, he fell into the pit, thereby suffering injuries. The pit which was 4′2½″ wide and 11′ deep and about 40′ long, was situated underneath at least three parallel tracks. When not in use, the pit was covered with heavy boards which were used as walkways by employees. When in use these boards were removed, leaving one permanent board 22″ wide which was then used as a walkway by employees until about May 1, 1945 when, to block its use when the pit was open, "safety chains" were erected enclosing 16½′ of the west end of the pit. On the day of the accident, the pit was open, the chains were up and a tourist car spotted

over the pit so that for the petitioner to use the permanent plank, he had to "squeeze" through a $9\frac{1}{2}$" opening between the car and the post holding the safety chain. There was another course the petitioner could have used in complete safety. It was claimed that the permanent plank had some oil or grease on it as a result of the character of work carried on in the pit. The petitioner, after squeezing through the $9\frac{1}{2}$" opening, and while walking on the 22" plank, slipped and fell into the pit. There was no rule prohibiting employees, including pit workers, from using the permanent board when the pit was open. The Supreme Court of Utah held the erection of the chains was evidence of orders not to use the permanent board when the chains were up, thereby holding that no negligence of the respondent was shown and, therefore, entered final judgment in respondent's favor. In reversing the State Supreme Court, the United States Supreme Court said, beginning on page 61 of the opinion:

> "There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was 'in part' the result of respondents' negligence. For while petitioner's failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides that contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *.
>
> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That propo-

sition is correct, since the Act imposes liability only for negligent injuries. Cf. Coray v. Southern Pac. Co., 335 U. S. 520. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business.' Tiller v. Atlantic C. L. R. Co., 318 U. S. 54, 67.

"There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, Griswold v. Gardner, 155 F. 2d 333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337-338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible * * *."

Mr. Justice Frankfurter, in his concurring opinion, said on page 65:

"* * * If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is

to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

The case of *Lavender vs. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. ed. 916, is cited by both parties to this action. In this case the decedent, L. E. Haney, employed by the respondent as a switch-tender, was killed on December 21, 1939, at the point of his employment where the tracks of The St. Louis, San Francisco Ry. and the Illinois Central cross. A judgment for the petitioner had been reversed by the Supreme Court of Missouri, holding there was no substantial evidence of negligence on the part of the railroad company to submit to the jury. The facts as contended by the petitioner are set forth in part on page 648 of the opinion above cited. The respondent's theory was that petitioner was murdered. The court held:

"1. In this action under the Federal Employers' Liability Act, the evidence of the defendants' negligence (detailed in the opinion) was sufficient to justify submission of the case to the jury; and the judgment of the appellate court setting aside the verdict for the plaintiff can not be sustained.

"2. There being a reasonable basis in the record for an inference by the jury that the injury resulted from the defendants' negligence, it is not within the province of the appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from that reached by the jury.

"3. In suits under the Federal Employers' Liability Act, the appellate court's function is exhausted when the evidentiary basis for the jury's verdict becomes apparent, it being immaterial that the court might draw a contrary inference or consider another conclusion more reasonable."

In the case of *Jesionowski vs. Boston & Maine Railroad Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. ed. 416, a switchman was killed when a train was derailed while backing onto a siding. The derailment was said by the respondent to have been caused by the negligence of the deceased in throwing the switch. However, there were other factors involving splintered planks. The court, in applying the doctrine of res ipsa loquitur, held:

> "1. The doctrine of res ipsa loquitur was applicable and the judgment against the railroad is sustained.
>
> "2. In this case, the jury's right to draw inferences from evidence and the sufficiency of the evidence to support a verdict are federal questions.
>
> "3. The facts support the jury's findings both that the deceased's conduct did not cause the accident and that the railroad's did."

In the case of *Jackson vs. Illinois Northern Railway*, 224 F. 2d 76, a railroad hostler helper experienced a hernia in picking up a large frozen mass of sand. He had been furnished the proper tools to do the work safely. The headnote of the case reads:

> "Where railroad hostler helper, who was required to shovel sand in sandhouse, and who was furnished with pick, chose to pick up with his hands a large frozen mass of sand instead of breaking it into smaller pieces, so that he could shovel it, and the mass broke, and he strained himself and suffered an inguinal hernia, railroad was not liable under the Federal Employers' Liability Act for his injuries."

In the case of *Webb vs. Illinois Central Railroad Co.*, 352 U. S. 512, 77 S. Ct. 451 (Fed. 25, 1957), 1 L. ed. 2d 503, the petitioner, a brakeman, sustained an injury when he slipped on a clinker, about the size of his fist, embedded in the roadbed of his employer. A judgment for the peti-

tioner was reversed by the Court of Appeals of the Seventh Circuit (228 F. 2d 257) on the ground that the trial court should have directed a verdict for the respondent, there being no evidence of negligence. The Supreme Court of the United States reversed the judgment of the Circuit Court of Appeals, holding there was ample evidence to justify, with reason, a jury finding of negligence. The parties conceded that a clinker in a roadbed created a hazardous condition (insecure footing). The only question presented was whether defendant was negligent in creating or permitting such hazard to exist. There was evidence that a section foreman had failed to screen for large clinkers which was a usual practice. Paragraphs 5 and 6 of the headnotes of the Supreme Court Reporter, above cited, provides:

> "5. In action under Federal Employers' Liability Act for injuries sustained by brakeman when he stepped on clinker, embedded in employer's roadbed, and fell, evidence would not reasonably support finding that clinker came from source other than ballast used in road repair operations; but even if there were other possible sources of clinker, directed verdict for employer would not be justified where evidence would reasonably support jury finding that employer had negligently caused clinker to be in ballast used in repair work and had failed to use proper care to discover and remove it.
>
> "6. Under Federal Employers' Liability Act, test of jury case is whether proofs justify with reason conclusion that employer's negligence played any part, even the slightest, in producing injury or death for which damages are sought; and it does not matter that, from evidence, jury could also, with reason, on grounds of probability, attribute result to other causes, including employee's contributory negligence."

The Supreme Court of the United States in the case of *Rodgers vs. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. ed. 2d 493 (decided February 25, 1957), gave further consideration to the question of whether an action by a petitioner under the Federal Employers' Liability Act should be submitted to a jury on the question of negligence. Here an employee was injured by falling over the top of a retaining wall of a culvert. The petitioner was engaged as a laborer while working on a right of way with others in burning weeds by the use of a crude torch. (The work had formerly been done by the use of a flame thrower operated from a car running on the tracks.) The petitioner had been instructed by his superior that while doing this work, he should stop weed-burning operations to inspect journals of passing trains for "hot boxes." At the time of his injury, a train was passing by and while inspecting the journals of the trucks, a wind was created by the train-fanned flames from the burning weeds and as he stepped back to avoid the flames, he fell over the culvert. In paragraphs 2, 3, 4, 5, and 6 of the report above cited, the headnotes provide:

"2. In action under Federal Employers' Liability Act for personal injuries sustained by section gang laborer, who had, in accordance with instructions, stopped his weed-burning operations to inspect journals of passing train for hot boxes, and slipped and fell while retreating from flames fanned by train, evidence would support jury finding that employer had, or should have, been aware of conditions which created likelihood that employee, in performing duties required of him, would suffer just such an injury as he did.

"3. Where employer was or should have been aware of conditions which created likelihood that employee, in performing duties required of him, would suffer just such an injury as he did when he fell while

retreating from flames of weeds which he was burning, it was irrelevant to employer's liability, under Federal Employers' Liability Act, whether immediate reason for employee's slipping had been presence of gravel, negligently allowed by employer to remain on surface of culvert, or some unidentified cause.

"4. Not the court, but the jury, is tribunal to determine fact, when uncertainty as to fact arises from testimony.

"5. Where probative facts would support with reason verdict favorable to plaintiff, in action under Federal Employers' Liability Act, decision as to whether plaintiff's conduct had been sole cause of his mishap was exclusively for jury to make.

"6. Under Federal Employers' Liability Act, test of jury case is whether proofs justify with reason conclusion that employer negligence played any part, even the slightest, in producing injury or death for which damages are sought, and it does not matter that, from the evidence, jury may also with reason, on grounds of probability attribute result to other causes, including employee's contributory negligence, since statute expressly imposes liability upon employer to pay damages for injury or death due in whole or in part, to employer's negligence."

From the foregoing authorities, it must be clear that if there is any evidence whatever by which it could be said that the carrier was negligent, such question becomes one for the jury. The cases just cited certainly circumscribe the most extreme fact situations where the question of negligence has been held to be a jury question by federal courts. We must, therefore, examine the evidence here presented to determine whether there is the slightest evidence of the violation of a duty imposed by law on the respondent to protect the safety of the petitioner. In considering this question, the findings of fact of the jury confine the inquiry to: (1) Does maintaining the "ends of

the ties of the track * * * a substantial distance above the ground level" (in this case by petitioner's evidence about 5")—a condition which a railroad carrier must avoid for the safety of those who work along such right of way; and (2) Is oil or grease covered with mud on a tie along a railroad right of way a condition which a carrier must provide against, even though the track is not that of such carrier and the operation or work in progress is that of a wrecking crew where the situs of their work is fixed by the place where the disaster happens. The declaration by the majority of this Court that the failure to grant assistance to the petitioner upon request can now be considered as an act of negligence supporting the verdict cannot be sustained. This contention cannot be so because of the jury's findings as to respondent's negligence, eliminating that claim from further consideration.

The first of these questions must be answered in the negative. It is a matter of common knowledge that the ends of the ties of a railroad track usually protrude above the ballast along the side of the track, and, therefore, the conclusion of the jury that to permit such condition to exist constituted negligence has no merit whatsoever. There is not a word of evidence that the ties here in question were any different from those generally found in all railroad construction. It is likewise true that this respondent, who did not own the roadbed where plaintiff was required to work under emergency conditions, could not be presumed to have knowledge of dangers, if any, hidden by weather conditions. It is also true, and the plaintiff's evidence supports the fact, that the weather was inclement,—the ground was covered with sleet and an extremely muddy condition was created by the work of retracking the boxcars. However, there is not the slightest suggestion that, if there were grease or oil on a tie, under these circumstances, that in the exercise of the duty of a

carrier to protect the safety of its employees, the presence of the oil or grease could, with reasonable diligence, have been discovered.

The plaintiff, in attempting to fix the respondent's liability, contends that because he found grease and mud on his shoe after he got back to the sitting car, that he must have gotten such grease from the place where his foot is said to have slipped when lifting the out-rigger block. Such conclusion is based on speculation and not factual proof.

For the foregoing reasons, it should be concluded that there is no evidence that would justify a submission to a jury the question of negligence founded upon the rules for which the foregoing authorities stand. The judgment should, therefore, be reversed and final judgment entered for the appellant.

APPENDIX C.

Common Pleas Journal Entry.

November 14, 1956: To Court:—Official Court Reporter in attendance four days and a fee of $16.00 is ordered taxed as costs. The jury in this action having on the 14th day of November, 1956, rendered a verdict in favor of plaintiff in the sum of Twenty Five Thousand Dollars ($25,000.00) against defendant, Pennsylvania Railroad Co., judgment is hereby rendered in favor of plaintiff against defendant Pennsylvania Railroad Co. for $25,000.00 and costs of this action. No record. Received for Filing this 14th day of November, 1956. Leonard F. Fuerst, Clerk of Court. By A. M. Harrington, Deputy Clerk. /s/ Judge John J. Mahon. (Civil Journal 340, page 491.)

APPENDIX D.

Journal Entry of the Court of Appeals.

February 10, 1958.

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court of Cuyahoga County, being Case No. 653099 on the records of said Court, and was argued by Counsel for the parties; and upon consideration, the Court finds no error prejudicial to the Appellant, and therefore the judgment of the Common Pleas Court of Cuyahoga County is affirmed and it is ordered that Appellee recover of Appellant his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court of Cuyahoga County to carry this judgment into execution. Exceptions.

APPENDIX E.

Statutes Involved.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Title 45, U. S. C., Section 56.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

Ohio Revised Code, Section 2315.17.

When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly.

APPENDIX F.

Judgment of Supreme Court of Ohio.

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Appeal from the Court of Appeals of Cuyahoga County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and final judgment is rendered for defendant.

It is further ordered and adjudged that appellant recover from appellee its costs expended in this Court and in the Court of Appeals and Court of Common Pleas taxed at $

ORDERED, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."